No. 80-1055

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM T. REMBOLD, JR., Administrator of the Estate of Scott Kendall Rembold, deceased minor, WILLIAM T. REMBOLD, JR., and NANCY CAROL (LIND) REMBOLD,

Appellants,

v.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, dba THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Appellees.

On Appeal From The Court of Appeals of The First Appellate District of Ohio

MOTION TO DISMISS OR AFFIRM

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Appellees.

On Appeal From The Court of Appeals of The First Appellate District of Ohio

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of the First Appellate District of Ohio, for the reasons that: The appeal is not within this Court's jurisdiction; the federal questions sought to be reviewed

were not timely raised below and were not expressly passed upon; the appeal does not present a substantial federal question, and; it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Ohio Revised Code Section 2305.11, as amended effective July 28, 1975.

As amended, Ohio Revised Code Section 2305.11 limits the period of "continuous negligence" defined in *Amer* v. *Akron City Hospital,* 47 Ohio St. 2d 85, 1 Ohio Op. 3d 51, 357 N.E. 2d 979 (1976), and *Wyler* v. *Tripi,* 25 Ohio St. 2d 154, 54 Ohio Op. 2d 283, 267 N.E. 2d 419 (1971), to four years after occurrence of the injury. Also, the disabilities of infancy, mental incompetency, and imprisonment granted in Ohio Revised Code Section 2305.16 are no longer applicable to toll the statute of limitations for malpractice.

Ohio Revised Code Section 2305.11 (B), however, grants a modified disability providing that a minor who is under ten years of age when injured by the alleged malpractice has until his fourteenth birthday to file an action.

B. The Proceedings Below

Scott Kendall Rembold was born on July 31, 1962. Appellants allege that due to the negligence of Appellees, Scott Rembold suffered brain damage and permanent in-

jury at the time of his birth. On August 13, 1978, Scott Rembold died.

On July 29, 1977, Appellants notified Appellee, pursuant to Ohio Revised Code Section 2305.11 (A), that they were considering the filing of a malpractice action based upon the above allegations. On January 25, 1978, such an action was commenced.

Appellee, Elizabeth Gamble Deaconess Home Association, moved for judgment on the pleadings, asserting the bar of the statute of limitations. Appellee, John G. Fleming, M.D., moved for dismissal upon the same grounds. On December 8, 1978, the Court of Common Pleas of Hamilton County, Ohio, entered judgments granting such motion.

The Court of Appeals of the First Appellate District affirmed the judgment of the Court of Common Pleas on March 19, 1980. On June 27, 1980 the Supreme Court of Ohio denied Appellants' Motion to Certify the Record, and sua sponte dismissed their appeal. Appellants filed two Motions for Rehearing, which were denied on July 30, 1980 and November 26, 1980, respectively.

II.

ARGUMENT

A. This Appeal is Not Within the Court's Jurisdiction; The Federal Questions Sought To Be Reviewed Were Not Timely Raised Below and Were Not Expressly Passed Upon.

In the court below, Appellants presented five issues for review. They are reprinted as presented to that court in Appendix B-11 to Appellants' Jurisdictional Statement. A brief examination of those issues suffices to clearly reveal that Appellants therein raised only two challenges to Ohio Revised Code Section 2305.11 under the United States Constitution. The remaining challenges were premised either upon the Constitution of the State of Ohio or the statutes and common law of Ohio.

The decision rendered by the Court of Appeals of the First Appellate District of Ohio likewise reveals that the court considered the five issues precisely as raised by Appellants, and disposed of all save two, solely upon the basis of Ohio constitutional and statutory provisions.

Therefore, Appellants' failure to present below all "Questions Presented" to this Court other than those designated 1-C and 1-D, deprives this Court of jurisdiction to review such issues, *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969), and this appeal must be dismissed as to such issues.

B. The Appeal Does Not Present a Substantial Federal Question, and It Is Manifest That the Questions Upon Which the Decision of the Cause Depends Are So Unsubstantial As Not To Need Further Argument.

There are, thus, only two issues which remain to be addressed by this Court: vagueness and equal protection.

Neither presents a substantial federal question, nor requires further argument.

Appellants' claim that Ohio Revised Code Section 2305.-11 is void for vagueness cannot survive even minimal scrutiny in light of the decision of the Supreme Court of Ohio in *Vance* v. *St. Vincent Hospital and Medical Center,* 60 Ohio St. 2d 36 (1980), a copy of which Appellants have included as Appendix B-2 to their Jurisdictional Statement. The syllabus of the *Vance* opinion, which under Ohio law is the law of the case, clearly states that:

> A minor of ten years of age or older must file a medical malpractice action within the time limitations set forth in R.C. 2305.11 (A) and (B), notwithstanding R.C. 2305.16.

Thus, any ambiguity which may have previously existed in Ohio Revised Code Section 2305.11 has been conclusively removed, and Appellants' claims herein remain barred. Moreover, Appellants have never contended that under the language of this statute their claims are not barred, or that they failed to understand the import of the statute, and are therefore prejudiced. Indeed, it is the unmistakable certainty of such bar which they have asserted as a violation of their right to equal protection of the laws.

Despite the *Vance* opinion, which has been tendered to this Court by Appellants, and despite the Appellants' implicit concession to the clarity of this statute, Appellants allege that some general vagueness exists which renders it unconstitutional. In view of the *Vance* decision and Appellants' obvious appreciation of the statute's adverse operation as to them, this argument is both puzzling and logically unsound. Additionally, having not been disadvantaged by the illusory vagueness, Appellants have no standing to challenge it. No amount of hypothetical questions can alter this simple fact.

On appeal, this Court must accept the construction of Ohio Revised Code Section 2305.11 made by the Supreme Court of Ohio, and proceed to test the constitutional validity of the statute on that basis. *Hortonville Joint School District No. 7* v. *Hortonville Education Assn.*, 426 U.S. 482 (1976); *Kingley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Guaranty Trust Company* v. *Blodgett*, 287 U.S. 509 (1933). When Ohio Revised Code Section 2305.-11 is examined in light of the *Vance* construction, there can be no doubt that any ambiguity or vagueness alleged by Appellants is purely imaginary, and would not, in any event, operate to their detriment under the facts herein.

Appellants remaining issue is that Ohio Revised Code Section 2305.11 denies them the equal protection of the law by establishing two classes of malpractice plaintiffs, and by rendering Ohio Revised Code Section 2305.16 inapplicable to malpractice claims. This assertion is without merit, and in light of established precedent, raises no substantial federal question before this Court.

Any statute of limitations will eventually operate to bar a remedy, and the time within which a claim should be asserted is a matter of public policy. This Court has consistently held for many years that neither the bar of a statute of limitations nor a particular period of limitations is a vested right protected by the Fourteenth Amendment. *Campbell* v. *Holt*, 115 U.S. 620 (1885); *Vance* v. *Vance*, 108 U.S. 514 (1883).

In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), in which the Court approved extension of a statute of limitations to restore previously barred claims, the reasons therefor were expressed as follows:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They repre-

> sent expedience, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omittd) They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and the unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.

Supra, at 314.

More recently, in a case involving the period of limitations under the Federal Tort Claims Act, the Court stated:

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter,* 101 U.S. 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States* v. *Marion,* 404 U.S. 307, 322, n. 14 (1971); *Burnett* v. *New York Central R. Co.,* 380 U.S. 424, 428 (1965); *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314 (1945); *Missouri, K. & T. R. Co.* v. *Harriman,* 227 U.S. 657, 672 (1913); *Bell* v. *Morrison,* 1 Pet. 351, 360 (1828).

United States v. *Kubrick,* 444 U.S. 111 (1979).

In Ohio, statutes of limitations apply to and bar all persons without regard to disabilities, unless the operation thereof is excepted by an express saving clause. *Burlovic* v. *Farmer,* 162 Ohio St. 46, 54 Ohio Op. 5, 120 N.E. 2d 705 (1954); *Favorite* v. *Booher's Adm'r.,* 17 Ohio St. 548 (1867). The same public policy imperatives described above apply to the grant or the continuation of legal disabilities.

Indeed, nearly one hundred years ago this Court rejected the claim that the Constitution requires that minors be excepted from statutes of limitations.

> The Constitution of the United States, to which appeal is made in this case, gives to minors no special rights beyond others, and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every insance upon express language in those statutes giving them time, after majority or after cessation of coverture, to assert their rights.

Vance v. *Vance, Supra,* at 521. See also: *Ornstein* v. *Regan,* 604 F. 2d 212 (2d Cir. 1979); *Murry* v. *City of Milford,* 380 F. 2d 468 (2d Cir. 1967); *Pittman* v. *United States,* 341 F. 2d 729 (9th Cir. 1965), *cert. den.,* 382 U.S. 941 (1965).

In its amendment of Ohio Revised Code Section 2305.11, the General Assembly has determined that public policy is served by excepting malpractice claims from the disabilities contained in Ohio Revised Code Section 2305.16. By crafting a complete revision of malpractice law, it has cre-

ated a comprehensive statutory scheme to reduce the period of uncertainty and to prevent stale claims.

In many respects this scheme is similar to that created by Congress in the Federal Tort Claims Act, 28 U.S.C. Section 2401 et seq. It is well established that under such Act a claimant's minority does not toll the statute of limitations. *Robbins* v. *United States,* 624 F. 2d 971 (10th Cir. 1980); *Smith* v. *United States,* 588 F. 2d 1209 (8th Cir. 1978); *Pittman* v. *United States, Supra.* Moreover, at least one Circuit has likewise held that incompetency has no tolling effect. *Casias* v. *United States,* 523 F.2d 1339 (10th Cir. 1967). No one can seriously contend that the Federal Tort Claims Act is, therefore unconstitutional.

In *Richardson* v. *Doe,* 176 Ohio St. 370, 27 Ohio Op. 2d 345, 199 N.E. 2d 878 (1964), the Supreme Court of Ohio recognized many of the unique aspects of malpractice claims and defenses.

> It is the misfortune of both physicians and lawyers that, in a very considerable proportion of their cases, they are unable to accomplish the purpose desired. The general public often fails to realize that circumstances over which these persons have no control may make it impossible for them to accomplish what they set out to do. Since physicians must often fail to fulfill expectations, they, along with lawyers, are peculiarly susceptible to the charge of failure in the performance of their professional duties. With passage of time, it becomes more and more difficult for a physician to establish that he exercised due care in performing his services. If sufficient time elapses, it may be impossible to determine whether the present physical condition of a person is the result of a lack of care and skill in prior treatment or the result of factors unrelated to treatment.
>
> Because of the possibility of unwarranted and fraud-

> ulent claims which would be difficult to disprove, the General Assembly in 1894 amended the one year statute of limitations, Section 4983, Revised Statutes (Section 2305.11, Revised Code), to include actions for malpractice. 91 Ohio Laws, 299.

Supra, at 346-347.

Appellants herein cannot be heard to complain because the General Assembly has seen the unique public policy implications of malpractice litigation, and has chosen to again act to reduce the probability of stale, unwarranted, and fraudulent claims by limiting the previously granted disabilities found in Ohio Revised Code Section 2305.16. Clearly, if it is within the power of the General Assembly to distinguish between malpractice and other personal injury claims in establishing a one year statute of limitation, it is likewise within its power to draw such distinctions in the application of legal disabilities. Whether the route selected by the legislature is wise or unwise is not subject to judicial inquiry.

Ohio Revised Code Section 2305.11 further establishes two classes of medical malpractice claimants: Those who have reached their tenth birthday at the time of the alleged malpractice, and; those who have not reached their tenth birthday at the time of the alleged malpractice. Appellants urge that such a classification has denied them equal protection, since Scott Rembold, a minor over ten years of age on July 28, 1975, was granted less time to commence his action than all minors who were under ten years of age on that date.

The legislature is not forbidden to classify according to general considerations and with regard to prevailing conditions. *Miller* v. *Wilson,* 236 U.S. 373 (1915); *State ex rel. Lourin* v. *Industrial Commission,* 138 Ohio St. 618, 21

Ohio Op. 490, 37 N.E. 2d 595 (1941); *List* v. *Cooperative Ass'n.*, 114 Ohio St. 361 (1926). However, the propriety of such classification is subject to certain constitutional standards.

Where a legislative classification interferes with the exercise of a fundamental right such as speech, travel, or voting, *Shapiro* v. *Thompson*, 394 U.S. 619 (1969); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Loving* v. *Virginia*, 388 U.S. 1 (1967), or operates to the disadvantage of a suspect class, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), it will be subject to "strict scrutiny" by the courts.

However, when legislation neither infringes upon a fundamental right nor burdens a suspect class, a classification, even though discriminatory, need only further an appropriate governmental interest and apply equally to all persons within a class in order to be valid. *Police Department of Chicago* v. *Mosely*, 408 U.S. 92 (1972). Under this standard, the Court must examine the legislation in light of the language of *McGowan* v. *Maryland*, 366 U.S. 420 (1961):

> . . . The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.* (emphasis added)

Supra, at 425-426.

Since Appellants have not demonstrated that the operation of amended Ohio Revised Code Section 2305.11 af-

fects either a fundamental right or a suspect class, the appropriate standard of inquiry is "rational basis". Applying this test leads inescapably to the conclusion that Appellants have presented no substantial federal question.

In *Denicola* v. *Providence Hospital,* 47 Ohio St. 2d 115, 11 Ohio Op. 3d 390, 387 N.E. 2d 231 (1979), the Supreme Court of Ohio approved of restrictions upon expert medical malpractice witnesses, explicitly finding that an appropriate governmental interest was furthered by the differential treatment. In reaching that conclusion the Court quoted the emergency declaration of the Act and observed:

> Specifically, *the General Assembly was legitimately concerned with* the competency of medical malpractice experts testifying in medical malpractice claims, and *the profound impact of such cases on the availability of medical malpractice insurance and resulting availability of health care in Ohio.* (emphasis added).

Supra, at 120.

This same "legitimate concern", as well as those factors noted by the court in *Richardson* v. *Doe, supra,* were also the impetus for the amendments to Ohio Revised Code Section 2305.11 which Appellants challenge.

Under the law as it existed prior to July 28, 1975, potential malpractice defendants were subjected to long and potentially open-ended periods of uncertainty before the expiration of the statute of limitations. *Amer* v. *Akron City Hospital, supra; Wyler* v. *Tripi, supra.* Malpractice insurers were thus unable to calculate necessary reserves, and either discontinued offering coverage or increased premiums dramatically. Parties, witnesses, evidence and memories became unavailable or unreliable. *United States* v. *Kubrick, supra.*

The instant case provides a vivid example of "a state of facts" demonstrating the reasonableness of the General Assembly's action. Scott Rembold was both a minor and a mental incompetent. Had he lived, his minority would have ended on July 31, 1980. His incompetency, however, would have continued for his entire life. Under the pre-July, 1975 law, the statute of limitations would never have run against him.

Moreover, Scott Rembold's parents, Appellants herein, had known of his condition for nearly fifteen years and had chosen not to sue on his behalf. They made that choice despite the obvious fact that he would never have been able to personally pursue any claim which he may have had. This is not a situation where the putative plaintiff would reach majority and be capable of determining whether to file suit. His incompetency was permanent, and its affect upon his claim was identical to that of an incompetent adult.

The General Assembly could rationally conclude that such an open-ended exposure to malpractice claims is not in the public interest, and that the guardian of any incompetent over ten years of age could reasonably be held to bring his claim within the same reasonable time provided to other malpractice plaintiffs.

The problem of lost information and witnesses is of special concern to this Appellee, since hospitals do not die or disappear. If the guardian of an incompetent plaintiff is bound by no statute of limitations, a suit filed 25 years after the alleged malpractice may find the hospital as the only available defendant, and the one least able to defend itself.

Many records covering the period of Scott Rembold's birth have been routinely destroyed, and others have been

lost. Also, there has been great difficulty in reconstrucing detailed information concerning witnesses and parties after the passage of long periods of time. Again, these are precisely the evils which were referred to in *Richardson* v. *Doe, supra,* and against which the General Assembly took corrective action.

Appellants apparently find constitutional fault with the legislature's failure to create a single statute of limitations for all minors, and its choice of age ten as the dividing line between the two classes of malpractice plaintiffs. Since, as explained above, Appellants' decedent's minority is insignificant, Appellee disputes Appellants' standing to raise this issue. Nonetheless Appellee has discussed at length the absence of any right, constitutional or otherwise, possessed by minors which requires that they be accorded some differential or preferred status. Any legal disability is merely a legislative grant which can be modified in the manner described above. To accept Appellants' assertion would be to:

> . . . hold that the age of majority becomes inseparably intertwined with appellant's cause of action. . . . (;) the equivalent of holding that majority or minority is a fixed or vested right rather than a status.

Cook v. *Matvejs,* 56 Ohio St. 2d 234, 10 Ohio Op. 3d 384, 383 N.E. 2d 601 (1978) ; *Vance* v. *Vance, supra.*

In 1975, the General Assembly determined that the public interest would be served by classifying malpractice plaintiffs into the two groups previously described. Appellants urge that this classification unconstitutionally operates to give younger minors a greater period of limitations than that given older minors.

It is correct that under these classifications some persons will have longer periods than others in which to commence

an action. However, this situation existed under the former Ohio Revised Code Section 2305.11, and exists now under every statute of limitations to which Ohio Revised Code Section 2305.16 applies. For example, a minor struck by an automobile when one year of age has a greater time period until his majority than one suffering the same injury at twelve years of age. Likewise, the guardian of a negligently injured incompetent child has far more time to sue than a similarly situated guardian of an elderly adult.

What the 1975 amendments to Ohio Revised Code Section 2305.11 have done is change the focal point of the malpractice legal disability of minority from eighteen to ten, and eliminate all other disabilities. Appellants' argument contra is predicated upon the proposition that it is proper for the General Assembly to grant the benefits of a legal disability to incompetents, the imprisoned and all persons under eighteen, but unconstitutional to grant such benefits only to minors under ten. This argument incorrectly presumes that a legal disability is "a fixed or vested right, rather than a status." *Cook* v. *Matvejs, supra.* Further, it would grant that status such an exalted position in the law that the General Assembly would be forever foreclosed from subordinating it to the general welfare. Surely the Constitution does not mandate such a restriction upon the prerogatives of the legislature.

Although the legislative classifications in Ohio Revised Code Section 2305.11, as others, may be subject to criticism for imprecision or inequities, perfection is neither required nor obtainable. *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977).

> . . . To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The

> problems of government are practical ones and may justify, if they do not require, rough accommodations . . . What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to . . . judicial review . . .

Metropolis Theatre Co. v. *Chicago,* 228 U.S. 61 (1913). Classifications need only make real and substantial distinctions which can be justified by any reasonably conceived state of facts under which they further a legitimate legislative objective. *McGowan* v. *Maryland, supra*; *Denicola* v. *Providence Hospital, supra.*

The Supreme Court of Ohio has acknowledged the legitimacy of the General Assembly's objective, *Denicola* v. *Providence Hospital, supra;* and Appellee has extensively described the propriety of the distinctions drawn and the reasonableness of the facts justifying such distinctions. As the Court of Appeals stated, the classifications are no more irrational than many other well established age classifications in the law. See for example: Former Ohio Revised Code Section 3109.04; Ohio Revised Code Section 4707.08; Ohio Revised Code Sections 2111.12 and 2111.46; *Holbrock* v. *Hamilton Distributors, Inc.,* 11 Ohio St. 2d 185, 40 Ohio Op. 2d 168, 228 N.E. 2d 628 (1967).

Although Appellants have raised the spectre of an equal protection violation herein, the above discussion demonstrates that no substantial federal question in that regard has been presented. The legislative power to modify statutes of limitations and to make reasonable classifications is solidly established. *Campbell* v. *Holt, supra*; *Chase Securities Corp.* v. *Donaldson, supra*; *McGowan* v. *Maryland, supra.* The absence of any constitutional right to legal disabilities has long been settled. *Vance* v. *Vance, supra.* The well recognized distinctions between malpractice and

other negligent acts are well defined. *Richardson* v. *Doe, supra.*

Appellants have shown no reason why the facts herein demand a re-examination of those clear and well settled principles by this Court. *Zucht* v. *King,* 260 U.S. 174 (1922).

Appellee wishes to call the Court's attention to several misrepresentations included in Appellants' Jurisdictional Statement. First, Ohio Revised Code Section 2305.11 does not apply to claims of negligence against persons other than lawyers, physicians, and certain other medical professionals.

Second, in *Gayle* v. *Fening,* Case No. 76-2458, cited by Appellants, the United States Court of Appeals for the Sixth Circuit *did not* "determine" that the appropriate age of majority is eighteen in medical malpractice cases in Ohio. The *Gayle* court upheld a District Court interpretation of the Ohio statutory reduction of the age of majority from twenty-one to eighteen. That interpretation held that a malpractice plaintiff who was twenty at the time of the reduction must file her action within one year of the amendment. The *Gayle* decision *did not* concern Ohio Revised Code Section 2305.11, and the statute is not referred to in the opinion.

Third, neither *Gayle* nor the other decisions referred to in footnote 15 to Appellants' Jurisdictional Statement, "are in direct contradiction" to the opinion below in this matter. Indeed, *Wade* v. *Lynn,* 181 F.Supp. 361 (N.D. Oh. 1960), antedates the amendment to O.R.C. § 2305.11 by fifteen years. Further, the other cited decisions are opinions of trial courts and do not relate to O.R.C. § 2305.11.

III.

CONCLUSION

This Court, on two occasions has rejected constitutional challenges to various provisions of state medical malpractice legislation. *State ex rel. Schneider* v. *Liggett,* 439 U.S. 808 (1978), appeal dismissed for want of substantial federal question; *Landgraff* v. *Wagner,* 429 U.S. 806 (1976), appeal dismissed for want of jurisdiction. No issue has been put forth by Appellants which requires contrary action in this cause.

Wherefore, Appellee respectfully submits that, insofar as this appeal may be within this Court's jurisdiction, it does not present a substantial federal question, and it is manifest that the questions upon which this cause depends are so unsubstantial as not to need further argument.

Accordingly, Appellee moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of the First Appellate District of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Motion to Dismiss or Affirm with Appendices were served upon each of the following: Marlene Penny Manes, Attorney at Law, Eagle Savings Building, 914 Main Street, Cincinnati, Ohio 45202, and Frederick Brockmeier, Attorney at Law, 900 Central Trust Tower, Cincinnati, Ohio 45202, attorneys of record for Appellants and Appellee Fleming, respectively, and William J. Brown, Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, by placing the same in ordinary United States mail, postage prepaid, this 23rd day of January, 1981.

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C. J. DeMICHELIS

Attorney of record for Appellee, Christ Hospital.